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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/769,158	01/29/2004	Richard C. Smith	M-15596 US	7774
32605	7590	05/03/2006		EXAMINER
		MACPHERSON KWOK CHEN & HEID LLP		DABNEY, PHYLESHA LARVINIA
		1762 TECHNOLOGY DRIVE, SUITE 226		
		SAN JOSE, CA 95110	ART UNIT	PAPER NUMBER
			2615	

DATE MAILED: 05/03/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	Application No.	Applicant(s)
	10/769,158	smith, richard
	Examiner Phylesha L. Dabney	Art Unit 2615

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

1) Responsive to communication(s) filed on 03 March 2006.

2a) This action is FINAL. 2b) This action is non-final.

3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

4) Claim(s) 1-9,11-19,25-30,32,33 and 35 is/are pending in the application.

4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.

5) Claim(s) \_\_\_\_\_ is/are allowed.

6) Claim(s) 1-9,11-19,25-30,32,33 and 35 is/are rejected.

7) Claim(s) \_\_\_\_\_ is/are objected to.

8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

9) The specification is objected to by the Examiner.

10) The drawing(s) filed on 29 January 2004 is/are: a) accepted or b) objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a) All b) Some \* c) None of:

1. Certified copies of the priority documents have been received.
2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

1) Notice of References Cited (PTO-892)

2) Notice of Draftsperson's Patent Drawing Review (PTO-948)

3) Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_.

4) Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_.

5) Notice of Informal Patent Application (PTO-152)

6) Other: \_\_\_\_\_.

### **DETAILED ACTION**

This action is in response to this amendment received 28 June 2005 of which claims 1-9, 11-19, 25-30, 32-33, and 35 are pending, and claims 10, 20-24, 31, and 34 were cancelled.

#### *Specification*

The disclosure is objected to because of the following informalities: the trademark is not properly identified in the specification. The specification does not have the terminology “trademark” or “trade name” and/or symbol designation next to the ALPHA PVC 319-40/45. Appropriate correction is required.

#### *Claim Objections*

1. Claim 32 is objected to because of the following informalities: it was found that this claim does not have the proper symbol, in the case a ®, and/or “trademark” designation. Appropriate correction is required.

#### *Claim Rejections - 35 USC § 102*

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

2. Claims 1-9, 14, 19, 28-30 and 35 are rejected under 35 U.S.C. 102(b) as being anticipated by Langenbeck et al (U.S. Patent No. 1, 614, 987).

Regarding claim 1, Langenbeck teaches a device for facilitating hearing, the device comprising: an earpiece (figs. 1-4) configured to be captured at least partially within the conchae of an ear; and wherein the earpiece is configured for use in either ear without modification of the earpiece(page 2, column 1, lines 5-19).

Regarding claim 2, Langenbeck teaches the earpiece comprises detents (figs. 1-4; two end points of bow 6) configured to be captured by the conchae as shown in figure 1.

Regarding claim 3, Langenbeck teaches the earpiece (figs. 1-4; two end points of bow 6) is configured to be captured by protrusions of the conchae as shown in figure 1.

Regarding claim 4, Langenbeck teaches the earpiece (figs. 1-4) is configured to be captured at least partially by the antihelix of the ear (page 1 column 2, line 94 through page 2 column 1 line 4).

Regarding claims 5-7, Langenbeck teaches the earpiece (figs. 1-4) is generally symmetric about a plane that bisects the earpiece between the top and bottom thereof.

Regarding claims 8-9, The device as recited in claim 1, wherein the earpiece is configured such that one size thereof fits a range of sizes of ears, including most adult ears (page 1 column 1 lines 18-26 and lines 44-56).

Regarding claim 14, Langenbeck teaches the device further comprising a boss (1) having a bore (2) formed there through, the boss being configured to extend at least partially into the ear canal as shown in figure 1.

Regarding claim 19, Langenbeck teaches an acoustic conduit (2) configured so as to cause sound to pass through the earpiece.

Regarding claims 28–30, Langenbeck teaches the earpiece (figs. 1-5) in claims 1-7 and 19-20 corresponding to the method of claims 28-30. The method is inherent in that it simply provides logical implementation of the structure found in Langenbeck.

Regarding claim 35, Langenbeck teaches an earpiece (figs. 1-4) comprising: a body that is configured for use in either ear (page 2, column 1, lines 5-19); and a acoustic coupler (2) having a bore formed therein, the acoustic coupler (2) being configured so as to facilitate attached of acoustic tubing to the earpiece (page 1 column 2 lines 77-94).

3. Claims 1-7, 11-15, 25-26, and 28-30 are rejected under 35 U.S.C. 102(e) as being anticipated by Baskerville (US Publication No. 2005/0031146).

Regarding claims 1-3, Baskerville teaches a device (10) for facilitating hearing, the device comprising: an earpiece (12) configured to be captured at least partially within the conchae of an ear as shown in figure 1; and wherein the earpiece is configured for use in either

ear without modification of the earpiece by virtue of its construction being substantially similar to the present application.

Regarding claim 4, Baskerville teaches the earpiece (12) is configured to be captured at least partially by the antihelix of the ear as shown in figure 1.

Regarding claims 5-7, Baskerville teaches the earpiece is generally symmetric about a plane that bisects the earpiece between the top and bottom thereof as shown in figure 1.

Regarding claim 11, Baskerville teaches the earpiece is comprised of at least one rib (near line depicted outer portion 27) as shown in figures 1-2.

Regarding claim 12, Baskerville teaches the earpiece is comprised of at least one generally arcuate rib and at least one generally vertical rib (near line depicted outer portion 27), the generally vertical rib extending between points proximate ends of the arcuate rib as shown in figures 1-2.

Regarding claim 13, Baskerville teaches the earpiece is comprised of two ribs that are generally configured to define a D as shown in figures 1-2.

Regarding claim 14, Baskerville teaches a boss (26) having a bore (30) formed there through, the boss being configured to extend at least partially into the ear canal.

Regarding claim 15, Baskerville teaches the earpiece is formed of a resilient polymer (page 2, paragraph 19, silicone material).

Regarding claims 25-26, see the rejection of claims 1 and 15.

Regarding claims 28-30, Baskerville teaches the earpiece (12) in claims 1-7 corresponding to the method of claims 28-30. The method is inherent in that it simply provides logical implementation of the structure found in Baskerville.

#### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

4. Claims 16-18 are rejected under 35 U.S.C. 103(a) as being unpatentable over Langenbeck or Baskerville.

Regarding claims 16-18, neither Langenbeck nor Baskerville teach the specifics of the composition of the earpiece. However, it is known and extremely common for earpieces to be formed of injection molded polymeric material have Shore [A-D] Hardness in durometers of

between 30-50, for example to create the desired hardness and resiliency of the polymeric material as needed for the specific application, such as earpieces for comfort to the user, and cost efficiency. Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to use an injection molded polymeric material in the construction of the earpiece of Langenbeck or Baskerville for the reasons stated above.

5. Claims 27 and 32-33 are rejected under 35 U.S.C. 103(a) as being unpatentable over Baskerville.

Regarding claim 27, see the rejection of claim 18 with respect to Bakerville.

Regarding claims 32-33, Baskerville teaches an earpiece configured to be captured within the conchae of an ear by at least an antitragus.

Baskerville fails to teach or restrict the earpiece as being symmetrical and comprised of ALPHA PVC 319-40/45 (specification listed as 3019-40/45).

However, since the Applicant does not provide a standard for ascertaining the requisite degree of symmetry required and by virtue of its construction it is substantially similar to the present application potential small error tolerance; the Applicant states that the only requirement of the trademark ALPHA PVC 319-40/45 (specification listed as 3019-40/45) is to have a Shore A durometer of approximately 40 (specification page 5, paragraph 0028); and it is known and extremely common for earpieces to be formed of polymeric material having Shore [A-D] Hardness in durometers of between 30-50 for obtaining the desired hardness and resiliency of the polymeric material as needed for the specific comfortable construction and fit, it would have

been obvious to one of ordinary skill in the art at the time the invention was made to use polymeric material in the construction of the earpiece of Baskerville for obtaining the desired hardness and resiliency and thus providing comfortable fit to the user.

6. Claims 25-27, and 32-33 are rejected under 35 U.S.C. 103(a) as being unpatentable over Langenbeck.

Regarding claims 25-27, Langenbeck teaches all of the limitations as presented in claim 25-27 (see claims 1-7 above), except the earpiece being formed of polymer. It is known and extremely common for earpieces to be formed of injection molded polymeric material for cost efficiency in production. Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to use a polymeric material in the construction of the earpiece of Langenbeck for the reason stated above.

Regarding claims 32-33, Langenbeck teaches an earpiece configured to be captured within the conchae of an ear by at least an antitragus, wherein the earpiece is symmetrical.

Langenbeck fails to teach the earpiece comprised of ALPHA PVC 319-40/45 (specification listed as 3019-40/45).

However, since the applicant states that the only requirement of the trademark ALPHA PVC 319-40/45 (specification listed as 3019-40/45) is to have a Shore A durometer of approximately 40 (specification page 5, paragraph 0028) and it is known and extremely common for earpieces to be formed of polymeric material having Shore [A-D] Hardness in durometers of between 30-50 for obtaining the desired hardness and resiliency of the polymeric material as

needed for the specific application, it would have been obvious to one of ordinary skill in the art at the time the invention was made to use olymeric material in the construction of the earpiece of Langenbeck for obtaining the desired hardeness and resiliency and thus providing comfort to the user.

*Response to Arguments*

7. Applicant's arguments with respect to claims 1-9, 11-19, 25-30, 32-33, and 35 have been fully considered but they are not persuasive.

With respect to the Applicant's argument pertaining to the trademark ALPHA PVC 3019-40/45, the Examiner is maintaining the claim objection, claim rejection, and including a specification objection for the following reason:

The Applicant needs to clarify whether the product is intended to be used a trademark by including the appropriate designations such as the trade symbol, as such "ALPHA® PVC 3019-40/45" as well as the term "trademark" in association with the product in at least the specification.

If the Applicant intends for the product to follow the guideline of *Names Used in Trade* (MPEP 608.01(v)) then the applicant needs to establish a well-known status among traders in the industry for the product.

8. With respect to the Applicant's argument that the Landenbeck device needs modification in order to be used in either ear, the Examiner disagrees. Applicant's invention is rotated for the purpose of moving the device from one ear to the next. Similarly, the Landenbeck's original

designed structure without any modifications, such as change in design, is rotated and moved from one ear to the next. Therefore, the rejection is maintained.

9. With respect to the Applicant's argument that the Baskerville device is not symmetrical. Since the claimed language, "generally symmetrical", is not defined by the claim, and the specification does not provide a standard for ascertaining the requisite degree, the Examiner disagrees. The Baskerville reference applies to the language used since its structure is similar to the Applicant's invention, and the Applicant's specification and claims does not define a degree, such as dimensions. Therefore, the rejection is being maintained.

10. Furthermore, the applicant did not traverse the examiner's assertion of official notice with respect to claims 16-18, 25-27, and 32-33; therefore, the common knowledge or well-known in the art statement is taken to be admitted prior art because applicant failed to traverse the examiner's assertion of official notice (MPEP 2144.03).

### ***Conclusion***

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

US 20020096391 A1 (Smith et al) teaches using injection molded plastic in the ear having a durometer hardness of SHORE A 35/45 for comfort to the user.

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Phylesha L. Dabney whose telephone number is 571-272-7494. The examiner can normally be reached on Mondays, Tuesdays, Wednesdays, Fridays 8:30-4 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Sinh Tran can be reached on 571-272-7564. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

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